

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.
---

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

RICHARD BARTEL et al.,

Plaintiffs and Appellants,

v.

ROD COMPOSTI et al.,

Defendants and Respondents.

H044464

(Santa Cruz County

Super. Ct. No. CV177722)

Appellants Richard Bartel and Ellen Stok appeal from the trial court's judgment finding that Parcel 9, owned by respondents Rod Composti and Patrice Edwards, has an express, deeded access easement over Bartel and Stok's parcel, Parcel 6. Bartel and Stok claim that the August 1971 deed that subdivided the land containing Parcel 6 from the larger tract of land containing Parcel 9 in what came to be a seven-parcel subdivision did not reserve an easement over Parcel 6. Their alternative contention is that, even if such an easement was reserved, it was extinguished by a subsequent deed to Parcel 3 that failed to reserve an easement over Parcel 3 for the benefit of Parcel 9 even though the easement over Parcel 6 could not be utilized without passing over Parcel 3.

Bartel and Stok claim that we should exercise de novo review, but we conclude that we review the trial court's decision, after a contested court trial at which numerous percipient and expert witnesses testified, for substantial evidence. We conclude that substantial evidence supports the court's judgment, and we affirm.

## **I. Evidence Presented at Trial**

Bartel and Stok own Parcel 6, and Composti and Edwards own Parcel 9 in a seven-lot subdivision in rural Aptos. Fern Flat Road, a private road, runs along the southern boundary of the subdivision and provides access to the nearest public road.<sup>1</sup> Parcels 3, 5, 7, and 10 have direct access to Fern Flat Road. Parcel 6, which is otherwise landlocked, has access to Fern Flat Road by way of a private road now known as Pax Place Court (Pax), which runs from Fern Flat Road through Parcels 3, 5, and 6 across the middle of the original unsubdivided parcel before reaching the western edge of Parcel 8.<sup>2</sup> Parcel 9, which is also landlocked, is not adjacent to Parcel 6. Parcel 8, which is owned by Composti, lies to the east of Parcel 6 and to the west of Parcel 9. Access to Parcel 8 is available from a private road known as Upper Road, which, like Pax, connects to Fern Flat Road and runs through Parcels 3 and 5 before terminating at the western boundary of Parcel 8.

In February 1971, Opal G. Boyd acquired title to the undivided tract of land that became this seven-lot subdivision by means of a grant deed from Hill and Dale Land Company. This land had previously been owned by “L.N. Kusalich.” Kusalich’s daughter testified at trial that her father had taken her on the road that became Pax back in the 1950’s when he owned the land and used it for an apple orchard.<sup>3</sup> They used Pax for access to what later came to be Parcel 9. Kusalich’s daughter continued to travel that road until 1979.

---

<sup>1</sup> The northern boundary of the subdivision adjoins Nisene Marks State Park.

<sup>2</sup> No description by metes and bounds of Pax existed until a survey in 1983.

<sup>3</sup> Walton Haines, on the other hand, testified that Pax did not exist prior to 1970.

Walton Haines owned land on the south side of Fern Flat Road, across from a portion of Boyd's parcel.<sup>4</sup> Boyd's land was one of a group of parcels whose owners had entered into a Joint Maintenance Agreement (JMA) for Fern Flat Road in 1970. Haines and his land were not part of the JMA. Although the parcels subject to the JMA were subject to equal 30-foot rights of way on each side of Fern Flat Road, the Haines land was subject to only a 20-foot right of way for the south side of Fern Flat Road. Consequently, a portion of Boyd's land was subject to a 40-foot right-of-way for Fern Flat Road where her land adjoined Haines's property.

Boyd's first subdivision<sup>5</sup> of her parcel was an August 1971 deed granting title to Vern C. Sluyter of the land that was later subdivided into Parcels 6 and 7. This August 1971 deed provided that the deeded parcel was granted "TOGETHER with and Reserving a Right of Way 40 feet in width over an existing road which begins at the Easterly end of the course and distance on said above referenced map which reads 'S. 88° 19' 25" W. 227.76'; thence meandering in a general Easterly and Southeasterly direction to a point on the Easterly line of the above described parcel. [¶] Also together with and reserving a Right of Way over Fern Flat Road as shown on said above referenced map."<sup>6</sup> The "above referenced map" was identified as "that certain Record of Survey filed January 19, 1971 in Volume 54 of Maps, Page 8, Records of Santa Cruz County . . . ."

---

<sup>4</sup> Haines had owned the land since 1966 and had lived on his property continuously since 1973 and prior to that off and on since 1957. Haines's family had owned the property since 1894.

<sup>5</sup> Because each subdivision of Boyd's parcel occurred prior to 1974 and was a subdivision of a parcel into four or fewer parcels, her subdivisions of her land were not regulated by the Subdivision Map Act. (*van't Rood v. County of Santa Clara* (2003) 113 Cal.App.4th 549, 566.)

<sup>6</sup> Subsequent deeds to Parcel 6 included reference to the easement beginning at the S. 88° point and described it as "A NON-EXCLUSIVE RIGHT OF WAY" or "A Right of Way."

The January 1971 Record of Survey (the Record of Survey) depicts a point designated “S. 88° 19’ 25” W. 227.76” (which we will call the S. 88° point) at the centerline of Fern Flat Road just before Fern Flat Road heads south and then northeast before it reaches and begins to run along the northern boundary of Haines’s parcel. The S. 88° point matches the point where the road that became known as Pax begins at Fern Flat Road. The S. 88° point does *not* match the point at which Fern Flat Road, as shown on the Record of Survey, changes from a 30-foot easement on each side to a 40-foot easement on the Boyd side and a 20-foot easement on the Haines side. That change occurs after Fern Flat Road proceeds south from the S. 88° point and then northeast, at the point where Fern Flat Road turns briefly southwest.

In December 1971, Boyd subdivided her remaining land by deeding Parcel 3 to the Wiltons. The deed to the Wiltons stated that Parcel 3 was granted “TOGETHER WITH a right of way over Fern Flat Road as shown on said above referenced map” and “RESERVING a right of way 40 feet wide over the existing” Upper Road. The Wilton deed did not explicitly reserve a right of way over Pax through Parcel 3 for the benefit of Boyd’s remaining land.<sup>7</sup>

A week after the Wilton deed was recorded, Boyd subdivided her remaining land by granting title by deed to the land that became Parcels 8, 9, and 10 to Billie Bottemiller. The Bottemiller deed stated that the land was granted “TOGETHER with and subject to Rights of Way of Record” and “TOGETHER with and subject to a Right of Way over Fern Flat Road.” Shortly thereafter, Sluyter deeded Parcel 7 to Robert Shoemaker, which is what made Parcel 6 landlocked. The Shoemaker deed stated that Parcel 7 was granted

---

<sup>7</sup> In 1995, a subsequent deed for Parcel 3 was recorded that specifically included “[a] Non-Exclusive Right of Way” with the same S. 88° description that appeared in the August 1971 deed.

“TOGETHER with and Subject to Rights of Way of Record.” Neither Pax nor Upper Road crosses Parcel 7.

After the Bottemiller deed, Boyd retained title to only Parcel 5. In February 1973, Boyd deeded Parcel 5 to the Garbesis. The deed to the Garbesis contained a “TOGETHER WITH” reference to the right of way at the S. 88° point, and the additional references “ALSO TOGETHER with a right of way over Fern Flat Road,” and “TOGETHER WITH AND SUBJECT TO a right of way” over Upper Road.<sup>8</sup>

Robert DeWitt testified at trial for Bartel and Stok as an expert on interpreting deeds, legal descriptions, and surveys. DeWitt understood the language “together with” to refer to a grant of an easement on other property, while he believed that the language “subject to” was synonymous with “reserving” and both referred to an easement that “actually crosses the property that’s being conveyed.” DeWitt used these terms in his profession as a land surveyor.<sup>9</sup> He could not testify as to whether Boyd had shared his understanding of these terms because he knew nothing of Boyd. DeWitt also knew nothing of Bottemiller. DeWitt’s opinion was that the description of the S. 88° point easement in the August 1971 deed “fits the alignment of Fern Flat Road more closely than it fits” Pax. He did not believe that Pax was “generally southerly and easterly,” as the easement was described in the August 1971 deed. Pax had “a northerly leg to it.” However, he conceded that Fern Flat Road also had a “smaller” “leg” that went “northeast.” DeWitt also conceded that the change from a 30-foot right of way to a 40-foot right of way began at the boundary between Parcel 3 and Parcel 5, while the

---

<sup>8</sup> A subsequent owner of Parcel 5 granted Parcel 6 an express easement over Pax.

<sup>9</sup> The court noted that it would consider DeWitt’s understanding of these terms for the limited purpose of understanding how DeWitt had performed his work. “I’m going to be determining what those words mean in the context of all the evidence.” “I’m not receiving this for the purposes of construing the drafter’s state of mind or intent.” “It’s not admissible as an opinion as to what the drafter meant by the use of these words.”

easement identified in the August 1971 deed began to the west of that boundary on Parcel 3.

Bartel purchased Parcel 6 in 1998. His understanding of his deed and title report was that they did not mention any easements over his property. He acknowledged that his deed provided him with an easement over Pax through other parcels and that it described that easement as a “non-exclusive right-of-way,” but he did not believe that it granted anyone the right to cross Parcel 6.

Composti purchased Parcel 5 in 1982. In 1984, he sold Parcel 5, purchased Parcel 9, and began living on Parcel 9. At that time, he understood the access to Parcel 9 to be through Pax, and he always used Pax to access Parcel 9. Upper Road was “unpassable” at that time due to a landslide. Composti completed the building of a house on Parcel 9 in 1989 and lived there until around 1997.<sup>10</sup> In 2004, Composti purchased Parcel 8. The only buildable spot on Parcel 8 is accessed from Upper Road, and Composti understood the deeded right-of-way for access to Parcel 8 to be Upper Road. The sole buildable site on Parcel 8 cannot be accessed from Pax.<sup>11</sup> Composti had an agreement with the owner of Parcel 5 that Composti would maintain Pax from Fern Flat Road to the Parcel 6 property line.

## **II. Procedural Background**

In September 2013, Bartel and Stok filed an action against Composti and Edwards<sup>12</sup> for quiet title, nuisance, declaratory relief, and injunctive relief. Their claims

---

<sup>10</sup> The parties stipulated that marijuana was cultivated on Parcels 8 and 9 between 2010 and 2014. The marijuana farm was apparently what triggered this lawsuit.

<sup>11</sup> Composti did not claim at trial that Parcel 8 had an easement through Pax.

<sup>12</sup> The action also named Bank of America, N.A. (BoFA) as a defendant, and BoFA is a respondent on appeal. BoFA has a recorded security interest in Parcel 9, and its interest in this action is identical to that of Composti and Edwards.

for quiet title and declaratory relief were based on their contention that Parcel 9 does not have a deeded easement over Pax through Parcel 6. Composti and Edwards filed a cross-complaint for quiet title, declaratory relief, and injunctive relief against Bartel and Stok and the owners of Parcel 3 and Parcel 5. They claimed that Parcel 9 had a deeded easement over Pax through Parcels 3, 5, and 6. The owners of Parcels 3 and 5 stipulated that Parcel 9 had a deeded easement over Pax through their parcels.

At trial, Bartel and Stok principally contended that the first easement described in the August 1971 deed did not reserve an express easement over Pax across Parcel 6 but instead referred to “a 40-foot wide easement for Fern Flat Road” along the Haines parcel boundary. They also claimed at trial that, even if this reference was to Pax, it could not have created an easement benefitting Parcel 9 because Parcels 8 and 9 had not yet been separated from the larger parcel at that time. They argued that Boyd had intended for Parcels 8 and 9 to be accessed from Upper Road, which they claimed “was quite serviceable” at the time of the August 1971 deed, prior to a 1981 “slide” that seriously damaged Upper Road. Composti and Edwards took the position at trial that the August 1971 deed created an express easement over Pax across Parcel 6 that benefitted Parcel 9.

The action was tried to the court, and the court, at the request of the parties, did a site visit during the trial, which the court described as “very helpful to the court in understanding the conditions on the ground in relation to the evidence I hear.”

Bartel and Stok acknowledged at trial that the issue before the court was Boyd’s intent. They argued to the court that the first easement described in the August 1971 deed was intended to be an easement for Fern Flat Road. Bartel and Stok acknowledged that the issue before the court was whether that reference was to “the starting point of a road [(Pax)] or . . . the starting point of the easement [along Fern Flat Road].” They asserted that the description of this easement “matches [the easement along Fern Flat Road] from the approximate starting point where it is . . . [and] in terms of compass direction.” They argued that this theory was supported by the fact that Sluyter included

the same “S. 88” reference easement in a grant deed to Parcel 7, even though Pax did not run through Parcel 7. Bartel and Stok argued: “[I]t’s either got to be this deed that’s inaccurate or it’s got to be the other two deeds that involve 03 and 05.” “One of them’s wrong . . . .” “[I]t is for you to determine what her [(Boyd’s)] intent was with respect to which portions of her property.” “It’s our contention . . . it [(the first easement in the August 1971 deed)] relates to the widening of Fern Flat Road . . . .” They also argued that the August 1971 deed was “ambiguous” because it did not identify “what the dominant tenement was,” and “there is no Parcel 08, no 09 at the time that that deed was created.”

Composti and Edwards contended at trial that the “S. 88” reference in the August 1971 deed was to the starting point of Pax, not the boundary line of the Haines property, which they asserted was “a hundred or a hundred fifty feet to the west of that.” “The starting point is exactly where Pax Place Court starts.” Pax also met the description of the first easement in the August 1971 deed because it “meanders” in the described manner.

The court rejected the claim by Bartel and Stok that the first easement in the August 1971 deed was referring to the Fern Flat Road easement adjacent to the Haines parcel. The court found that the express reference in the August 1971 deed to “S. 88” was to Pax, not to Fern Flat Road. It stated: “All I can construe her [(Boyd’s)] intent from is the entire scheme of conveyances.” The court found that Boyd’s “intention was to create an express easement over Parcel 6 for ingress and egress over the Middle Road, now known as Pax Place Court, for the benefit of Parcel 9.”<sup>13</sup> The court made a factual finding “that, in fact, there were three separate roads at the time these grants were made.”

---

<sup>13</sup> The court made no finding regarding Parcel 8 because Composti, the owner of Parcel 8, did not seek such a finding.

The court expressly credited the expert testifying on behalf of Composti and Edwards over DeWitt.

The court concluded that there was “an easement appurtenant to Parcel 9 for ingress and egress to Parcel 9 across the Middle Road, now known as Pax Place Court . . . for the benefit of the owners of Parcel 9 . . . .” The court entered judgment quieting title to the Pax easement in favor of Parcel 9. Bartel and Stok timely filed a notice of appeal from the judgment.

### **III. Discussion**

Bartel and Stok make two contentions on appeal. One is the argument they made at trial: that the August 1971 deed’s “S. 88” reference to an easement was not to Pax but to Fern Flat Road. Their main contention on appeal, however, is that Boyd *extinguished* any easement over Pax across Parcel 6 when she granted title to Parcel 3 without reserving an easement over Pax.

#### **A. Standard of Review**

Bartel and Stok insist that we exercise de novo review because, they claim, the deeds were unambiguous and “the trial court’s conclusions were based on the interpretation of easement language contained in various deeds,” rather than on the resolution of any conflicts in the extrinsic evidence.<sup>14</sup> Composti and Edwards contend

---

<sup>14</sup> Bartel and Stok rely on cases that either were not appeals from judgments after contested trials (*Sarale v. Pacific Gas & Electric Co.* (2010) 189 Cal.App.4th 225, 245 [appeal after sustaining of demurrer]; *Gray v. McCormick* (2008) 167 Cal.App.4th 1019, 1023 [appeal after matter submitted on joint statement of undisputed facts]), or were not cases in which the extrinsic evidence was in conflict (*City of Manhattan Beach v. Superior Court* (1996) 13 Cal.4th 232, 238; *Van Klompenburg v. Berghold* (2005) 126 Cal.App.4th 345, 349). These cases are not on point. They also cite two statutes. Civil Code section 806 provides: “The extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired.” Civil Code section 1066

that we review the trial court's decision for substantial evidence because the deeds were ambiguous and the trial court was required to resolve conflicts in the extrinsic evidence in order to interpret the deeds in accordance with Boyd's intent.

Grant deeds are generally interpreted in the same manner as contracts. (*Riley v. Bear Creek Planning Committee* (1976) 17 Cal.3d 500, 516.) "The interpretation of a written instrument, even though it involves what might properly be called questions of fact [citation], is essentially a judicial function to be exercised according to the generally accepted canons of interpretation so that the purposes of the instrument may be given effect. [Citations.] Extrinsic evidence is 'admissible to interpret the instrument, but not to give it a meaning to which it is not reasonably susceptible' [citations], and it is the instrument itself that must be given effect. [Citations.] It is therefore solely a judicial function to interpret a written instrument *unless the interpretation turns upon the credibility of extrinsic evidence*. Accordingly, '[a]n appellate court is not bound by a construction of the contract based *solely* upon the terms of the written instrument without the aid of evidence [citations], *where there is no conflict in the evidence* [citations], or a determination has been made upon incompetent evidence [citation].'" (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865-866, italics added.)

"The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible." (*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 37.) "A contract may be explained by reference to *the circumstances under which it was made, and the matter to which it relates.*"

---

provides: "Grants are to be interpreted in like manner with contracts in general, except so far as is otherwise provided in this Article." As we explain in the text, our standard of review depends on whether the trial court resolved conflicts in the extrinsic evidence. These statutes do not provide otherwise.

(Civ. Code, § 1647, italics added.) “[E]xtrinsic evidence as to the circumstances under which a written instrument was made has been held to be admissible in ascertaining the parties’ expressed intentions, subject to the limitation that extrinsic evidence is not admissible in order to give the terms of a written instrument a meaning of which they are not reasonably susceptible.” (*Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 522.)

The rules regarding extrinsic evidence are just as applicable to grant deeds as they are to contracts. “In interpreting incomplete or ambiguous deeds, courts may consider extrinsic evidence of the circumstances under which the deed was made.” (*Moylan v. Dykes* (1986) 181 Cal.App.3d 561, 569.) “Grants are to be interpreted in like manner with contracts in general” (Civ. Code, § 1066), although “[a] grant is to be interpreted in favor of the grantee, except that a reservation in any grant . . . is to be interpreted in favor of the grantor.” (Civ. Code, § 1069.)

Although Bartel and Stok disavow it now, they argued at trial that the deeds were ambiguous, and the trial court based its interpretation on its determination of Boyd’s intent. Both parties produced extrinsic evidence aimed at supporting their respective positions, and the trial court had to resolve the conflicts in this evidence in order to determine Boyd’s intent. “[W]hen, as here, ascertaining the intent of the parties at the time the contract was executed depends on the credibility of extrinsic evidence, that credibility determination and the interpretation of the contract are questions of fact . . . .” (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395.) Here, the extrinsic evidence was largely concerned with the circumstances under which the deeds were executed, including the topography of Boyd’s parcel and the existence of the various roads through her parcel at the time the deeds were executed, and that evidence clearly played a key role in the court’s interpretation of Boyd’s deeds. Bartel and Stok tried to prove that Pax did not exist at the time Boyd executed the deeds, and Composti and Edwards countered with evidence showing that Pax was in use long before Boyd purchased the parcel. The trial court itself viewed the property and took into

account the topography of the parcel in determining Boyd's intent. "[W]hen the trial judge views the premises and a record of what he saw has not been made a part of the transcript on appeal, an appellate court must assume that the evidence acquired by such view is sufficient to sustain the finding in question." (*South Santa Clara Valley Water Conservation Dist. v. Johnson* (1964) 231 Cal.App.2d 388, 399.)

"[W]here extrinsic evidence has been properly admitted as an aid to the interpretation of a contract and the evidence conflicts, a reasonable construction of the agreement by the trial court which is supported by substantial evidence will be upheld." (*In re Marriage of Fonstein* (1976) 17 Cal.3d 738, 746-747.) Here, the extrinsic evidence was in conflict, and the trial court resolved those conflicts in determining the meaning of the deeds. We review the trial court's decision for substantial evidence.

#### **B. August 1971 Deed Reserved Easement Over Pax Through Parcel 6**

The August 1971 deed referred to two separate easements. The first of these easements was a grant and reservation of "a Right of Way 40 feet in width over an existing road" beginning at the S. 88° point and running fully across Parcel 6 to its eastern boundary. The second easement in this deed granted and reserved "a Right of Way over Fern Flat Road as shown on said above referenced map." The referenced map showed the easement over Fern Flat Road, including the larger width where the Boyd parcel met the Haines parcel. Although Haines testified that Pax did not exist in 1971, Kusalich's daughter testified that Pax had existed since the 1950's and continued to exist throughout the 1970's.

The trial court found that Pax existed at the time of the August 1971 deed and that Boyd was referring to Pax when she granted and reserved the first easement, which started at the beginning of Pax and ran through Parcel 6. This finding was supported by several key pieces of evidence. First, the August 1971 deed also granted and reserved an easement over Fern Flat Road that included the wider width along the Haines parcel,

suggesting the other easement did not refer to Fern Flat Road. Second, Kusalich's daughter's testimony established that Pax existed at the time of the August 1971 deed. Third, the topography of Boyd's parcel, as determined by the trial court's view of the property, reflected that she intended to provide access through the middle of the property when she began subdividing her land so that all of the parcels would have adequate access.

Bartel and Stok rely on various pieces of extrinsic evidence to support their claim that the trial court should have found that the first easement did not refer to Pax but to a portion of the Fern Flat Road easement. First, they cite Haines's testimony and their expert's testimony, but the trial court expressly discredited their expert and impliedly discredited Haines's testimony about the nonexistence of Pax when it credited the conflicting testimony of Kusalich's daughter. Second, they rely on a 1980 deed executed by Sluyter conveying Parcel 7, which they claim contains the same description of the easement that the court found to be Pax, and argue that Sluyter must have believed that this was not a reference to Pax because Pax does not run through Parcel 7.<sup>15</sup> The trial court was not obligated to conclude that Sluyter's possible later misunderstanding or misuse of this language meant that *Boyd* had previously intended it to have some other meaning. Notably, Sluyter did not include this language in his 1971 deed conveying Parcel 7. Third, Bartel and Stok note that some subsequent owners of various parcels, including Composti and Edwards, were unsure whether the easement language in the August 1971 deed ensured that they had access through Pax and took steps to ensure that they had such access. Again, the trial court could have concluded that the understandings of subsequent parcel owners were irrelevant to a determination of Boyd's intent. Finally,

---

<sup>15</sup> The deed they reference is not part of the exhibit concerning Parcel 7 that was transferred to this court. Sluyter's earlier deed transferring Parcel 7 contained no such reference.

Bartel and Stok argue that Boyd’s intent could not have been to reserve an easement over Pax because she subsequently granted Parcel 3 to the Wiltons without reserving an easement over Pax. The trial court could have reasonably concluded that Boyd had simply made a mistake in failing to include a reservation of that easement in the deed to the Wiltons, and Bartel and Stok acknowledged in the trial court that either the deed to the Wiltons or the August 1971 deed had to be in error.

### C. Extinguishment Theory

Bartel and Stok claim that, assuming the August 1971 deed reserved an easement over Pax, “Boyd terminated that easement reservation just months later when she made her second transfer – conveying Parcel 3 (the Parcel in which Middle/Pax connects with the main access route, Fern Flat Road) to Wilton ***without reserving an easement over Middle/Pax.***” They assert that, at the time of the deed to the Wiltons, “Boyd apparently recognized that Upper Road and Fern Flat Road – both of which directly connected to her remaining parcels *without using Middle/Pax* – provided sufficient access.” In their view, “Boyd’s transfer of Parcel 3 without a reservation was incompatible with the ‘right of way’ purpose of the previously-created reservation over Middle/Pax, and therefore effectuated a termination.”

Composti and Edwards assert that Bartel and Stok are barred from asserting an extinguishment theory on appeal because they failed to assert it in the trial court. Although the deed to the Wiltons was in evidence at trial, Bartel and Stok did not contend at trial that Boyd’s deed to the Wiltons *terminated* or *extinguished* the Pax easement. Instead, they argued that this deed was evidence that Boyd had not intended to reserve an easement over Pax in the August 1971 deed. Bartel and Stok claim that their extinguishment theory is not really new because their trial counsel relied at trial on the deed to the Wiltons, albeit to support a different theory, and, even if this theory is new, it presents a question of law on undisputed facts.

“The rule is well settled that the theory upon which a case is tried must be adhered to on appeal. A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant.” (*Ernst v. Searle* (1933) 218 Cal. 233, 240-241.) “There are exceptions but the general rule is especially true when the theory newly presented involves controverted questions of fact or mixed questions of law and fact. If a question of law only is presented on the facts appearing in the record the change in theory may be permitted. [Citation.] But if the new theory contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at the trial the opposing party should not be required to defend against it on appeal.” (*Panopulos v. Maderis* (1956) 47 Cal.2d 337, 341.)

Although Bartel and Stok try to avoid admitting that their extinguishment contention is a new theory raised for the first time on appeal, the record establishes that they never raised an extinguishment theory below. Their new theory is that Boyd’s subsequent deed to the Wiltons extinguished or “terminated” the easement that she had reserved in the August 1971 deed. They argue that, after executing the August 1971 deed, Boyd decided that there was no need for access through Pax for her remaining property and therefore extinguished the Pax easement by cutting off the portion through Parcel 3, which was necessary to reach the portion of Pax that ran through Parcel 6.

“A servitude is extinguished” “[b]y the performance of any act upon either tenement, by the owner of the servitude, or with his assent, which is incompatible with its nature or exercise.” (Civ. Code, § 811, subd. (3).) “In order to justify extinguishment of an easement, ‘[t]he acts of the owner of the dominant tenement must be of a character *so decisive and conclusive as to indicate a clear intent to abandon the easement.*’” [Citation.] The interference with use of the easement must be material and permanent rather than occasional and temporary in order to justify extinguishment.” (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 768, italics added.)

The extinguishment theory raised by Bartel and Stok for the first time on appeal is not a question of law on undisputed facts. In order to establish extinguishment, they were required to prove that, by executing the deed to the Wiltons, Boyd demonstrated “a clear intent to abandon the easement” and that her failure to reserve an easement over the portion of Pax that ran through Parcel 3 in the deed to the Wiltons was “permanent.” Boyd’s intent was a disputed factual issue at trial, and Composti and Edwards asserted that Boyd’s failure to reserve an easement over the portion of Pax that ran through Parcel 3 in the deed to the Wiltons was best characterized as a mistake in light of her other actions recognizing the Pax easement. There was also evidence that her failure to reserve the Pax easement in the deed to the Wiltons was not permanent as later actions by the subsequent owners of Parcel 3 corrected Boyd’s apparent mistake. Accordingly, we decline to entertain this new theory on appeal.

#### **IV. Disposition**

The judgment is affirmed.

---

Mihara, J.

WE CONCUR:

---

Elia, Acting P. J.

---

Bamattre-Manoukian, J.

Bartel v. Composti  
H044464